No. 94-728

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In the Supreme Court of the United States

OCTOBER TERM, 1994

IN RE LAWRENCE B. SMITH, PETITIONER

ON PETITION FOR A WRIT OF MANDMUS TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals, in remanding a case for reconsideration of sanctions imposed under Fed. R. Civ. P. 11 in light of the Rule's amendment in 1993, correctly held that the district court should be afforded discretion in deciding whether to impose sanctions against petitioner under the amended Rule, but that the district court should otherwise apply the version of the Rule in effect at the time the sanctions were originally imposed.

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OPINIONS BELOW

The opinion of the court of appeals affirming the imposition of sanctions on petitioner (Pet. App. a1-a25) is reported at 19 F.3d 72. A previous opinion of the court of appeals, affirming the dismissal of the first complaint filed by petitioner, is reported at 999 F.2d 708. The opinions of the district court concluding that sanctions should be imposed (Pet. App. a26-a37, a41-a51) are reported at 146 F.R.D. 58 and 151 F.R.D. 24. The orders of the district court calculating the amount of the sanctions (Pet. App. a37-a41, a51-a54) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 3, 1994. A petition for rehearing was denied on May 19, 1994. Pet. App. a25-a26. On July 29, 1994, Justice Thomas granted an extension of time in which to file a petition for a writ of certiorari to and including October

16, 1994. The petition for a writ of mandamus was filed on October 17, 1994 (a Monday). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1651(a). Petitioner also invokes this Court's jurisdiction under 28 U.S.C. 1254(1), if the Court treats the petition for a writ of mandamus as a petition for a writ of certiorari. See Pet. 3.

FEDERAL RULE OF CIVIL PROCEDURE INVOLVED

Before its amendment in 1993, Rule 11 of the Federal Rules of Civil Procedure provided in pertinent part as follows:

> The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. * * * If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it * * * an appropriate sanction.

The amended version of Rule 11, effective December 1, 1993, is applicable to civil cases pending on that date "insofar as just and practicable." Order Amending Federal Rules of Civil Procedure, H.R. Doc. No. 73, 103d Cong., 1st Sess. 1 (1993). The new Rule provides, in pertinent part, as follows:

(b) Representations to Court. By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney * * * is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, —

(1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; [and]

(2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modifica-tion, or reversal of existing law or the establishment of new law[.] * * *

(c) Sanctions. If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may, subject to the conditions stated below, impose an appropriate sanction upon the attorneys * * * that have violated subdivision (b) or are responsible for the violation.

(1) ***How Initiated.***

(A) ***By Motion.*** A motion for sanctions under this rule shall * * * describe the specific conduct alleged to violate subdivision (b). * * *

(3) ***Order.*** When imposing sanctions, the court shall describe the conduct determined to constitute a

violation of this rule and explain the basis for the sanction imposed.

STATEMENT

1. Petitioner is an attorney who represented three plaintiffs in two civil actions filed in the United States District Court for the Northern District of New York. Those actions arose out of an investigation by the Federal Aviation Administration (FAA) into safety violations by Mall Airways, Inc., a commuter airline based in Albany, New York. The investigation revealed that the airline was in violation of emergency safety regulations, and the FAA closed the airline for approximately two months. The FAA also sought, unsuccessfully, to charge Richard Knipe, the controlling owner of Mall, with civil penalties, and to revoke the Air Transport Pilot certificates of Glenn Valentine and Bernard Ford, managers of the airline. See *Knipe* v. *Skinner*, 999 F.2d 708, 709 (2d Cir. 1993).

Knipe, Valentine, and Ford, represented by petitioner as counsel, filed a 19-count *Bivens* complaint[1] for damages against 31 federal officials, including the Secretary of Transportation, alleging violations of their constitutional rights caused by the enforcement of the Federal Aviation Act of 1958, Pub. L. No. 85-726, 72 Stat. 731, 49 U.S.C. App. 1301 *et seq.*[2] See Pet. App. a54-a113. The district court dismissed the complaint on October 23, 1992, holding that all the defendants had statutory or regulatory authority for their actions, and that the Act

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[1] See *Bivens* v. *Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

[2] Although Ford was named as a plaintiff in the *Bivens* action, the complaint alleged no specific harm to Ford and requested no relief on his behalf. See Pet. App. a110-a113.

met constitutional requirements. Plaintiffs appealed, represented by petitioner. The court of appeals affirmed; it also concluded that the appeal was frivolous, and it ordered petitioner to show cause why he should not be ordered to pay double costs and fees for the frivolous appeal. *Knipe* v. *Skinner*, 999 F.2d at 711.

Four days after the district court dismissed the first action, Knipe, Valentine, and Ford, again represented by petitioner, filed another action, against the United States as defendant, under the Federal Tort Claims Act (FTCA), 28 U.S.C. 2671-2680. Pet. App. a114-a186. The FTCA complaint alleged that the United States had negligently supervised and trained the Secretary of Transportation, the Administrator of the FAA, and numerous other federal officials, and had negligently allowed them to develop an unconstitutional regulatory program. See Pet. App. a181. The FTCA complaint was based on the same set of facts as was the *Bivens* action. On April 12, 1993, the district court dismissed the FTCA complaint based on *res judicata*, and also on the ground that the allegations in the complaint fell within the discretionary function exception to the FTCA, 28 U.S.C. 2680(a). See Pet. App. a44.

2. Following dismissal of the first (*Bivens*) action, the defendants in that action moved for sanctions against petitioner under Federal Rule of Civil Procedure 11. The district court granted the motion for sanctions, concluding that "[petitioner's] arguments are not reasonable[,] * * * [petitioner] 'has crossed the line between zealous advocacy and frivolous conduct[,] * * * the instant complaint has no basis in law, and [petitioner] has not [made] a reasonable argument for modification of that law." Pet. App. a35-a36. The court pointed out that petitioner's legal theory had previously been rejected by

four courts of appeals.[3] Although the court acknowledged that petitioner had published a law review article advancing his legal theory and criticizing those decisions as incorrect (*id.* at a33), it observed that "the pleading signed in this matter had no chance of success under the law existing at the time" the complaint was filed (*id.* at a34), and that no intervening Supreme Court or appellate decisions supported petitioner's legal theories (*id.* at a35). The district court subsequently ordered petitioner to pay a sanction of $9,000, covering the defendants' attorney's fees and travel expenses in the *Bivens* action. *Id.* at a39-a41.

After dismissal of the FTCA action, the United States also filed a motion for sanctions under Rule 11. The district court granted the motion, observing that petitioner's arguments concerning the enforcement authority of the FAA raised in the FTCA case were "no different than they were in the [*Bivens*] action" (Pet. App. a46), and concluding that "[t]he root of [the FTCA] action, the previous one decided by this court, and countless other actions filed by [petitioner] is his own personal belief that the [FAA] lacks the authority to do what it has done in this case" (*id.* at a47). The court found that petitioner "failed to recognize the error of his ways concerning these arguments, and therefore violated Rule 11" (*ibid.*), and also that "the instant action was filed with an improper purpose in violation of Rule 11" (*id.* at a47-a48), namely, a "personal agenda against

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[3] The part of the court's opinion citing previous cases rejecting petitioner's theory is omitted from the version reprinted in the appendix, but it can be found in the reported version, 146 F.R.D. at 60. A full exposition of the judicial rejection of petitioner's theory about the unconstitutionality and illegality of the FAA's regulatory actions can be found in *Go Leasing, Inc.* v. *NTSB*, 800 F.2d 1514 (9th Cir. 1986).

the FAA" (*id.* at a50). The court subsequently ordered petitioner to pay a sanction of $7,252.89, an amount attributable to attorney's fees and travel expenses in the FTCA suit. *Id.* at a53.

3. Petitioner appealed both decisions imposing sanctions. As to the *Bivens* action, the court of appeals concluded that "[a] reasonable investigation of the law at the pertinent time would have revealed that [the officials'] alleged conduct did not violate any clearly established constitutional rights of the plaintiffs." Pet. App. a13-a14. In light of the fact that four circuits had rejected most of petitioner's legal theories, the court of appeals agreed with the district court that petitioner "cannot credibly argue that appellees could reasonabl[y] have known in 1988 that their conduct violated clearly established rights." *Id.* at a14. The court also concluded that other claims that had not previously been made to and rejected by other circuits, such as the contention that the FAA's regulatory actions violated the plaintiffs' statutory and constitutional rights to a jury trial, were also frivolous in the context of a *Bivens* action, since it could not reasonably be said, in light of the law at the time of the FAA's actions against the plaintiffs, that the defendant officials would have known that their adherence to FAA procedures was clearly unconstitutional. *Id.* at a17.

The court of appeals also upheld the district court's imposition of sanctions against petitioner for bringing the FTCA action. The court of appeals agreed with the district court that "reasserting * * * arguments in a new com[plaint] in a district court four days after that court has rejected those arguments in the context of the same factual circumstances affords grounds for finding that the new pleading was interposed for an improper purpose." Pet. App. a21. The court also upheld the

district court's conclusion that, in the FTCA action, petitioner failed to distinguish the underlying legal theories from those rejected in the *Bivens* action, which "evi[nced] a lack of good faith argument for the extension, modification, or reversal of existing law." *Ibid.*

Although the court of appeals thus concluded that the district court properly applied the standards for Rule 11 sanctions in place at the time of its decisions, the court also observed that Rule 11 had been amended after the sanctions orders were entered. Whereas, under the old version of the Rule, the district court was required to impose sanctions on petitioner once it determined that his pleadings were frivolous, see Pet. App. a30, the amended version of the Rule makes the decision to impose sanctions discretionary rather than mandatory, *id.* at a23. In addition, the old Rule required that arguments for extensions, modifications, or reversals of existing law be made in "good faith," but the new Rule requires that such arguments be "nonfrivolous." *Id.* at a24.

In light of those amendments, which are to be applied to cases pending on the effective date of the amendment "insofar as just and practicable," Pet. App. a24, the court of appeals concluded that the sanctions decisions should be remanded to the district court, to give that court an opportunity to exercise its discretion under the amended Rule 11. The court of appeals required, however, that the district court "should otherwise adhere to the version of Rule 11 in effect at the time of its prior decisions." *Ibid.* The court reasoned that "[a]ny further retroactive application of the amended Rule 11 would charge [petitioner] with knowledge of a rule not in effect at the time of filing and therefore would not advance

Rule 11's central goal of deterring baseless filings." *Id.* at a24-a25.

4. On remand, the district court, exercising its discretion under the new version of Rule 11, reaffirmed both of its prior decisions to impose sanctions on petitioner. Pet. App. a186-a187, a188-a189.

ARGUMENT

1. The decision of the court of appeals to remand this case with instructions to the district court to apply the amended version of Rule 11 in part constituted a just and practicable application of the amended Rule to the pending case. In reviewing the sanctions imposed on petitioner, the court of appeals acknowledged two changes to Rule 11 that are relevant to this case. First, the amendment of the Rule made the imposition of sanctions discretionary on the part of the district court. Second, the standard imposed on parties who argue for an extension, modification, or reversal of existing law or the establishment of new law is arguably more stringent under the amended Rule. Under the new Rule, such arguments must be "nonfrivolous," whereas, under the old Rule, such arguments were required to be made in "good faith." The advisory committee's note makes clear that the amendment "establishes an objective standard, intended to eliminate any 'empty-head pure-heart' justification for patently frivolous arguments." Fed. R. Civ. P. 11, advisory committee note (1993 Amendment) (28 U.S.C. App. at 775 (Supp. V 1993)).

The court of appeals concluded that petitioner should receive the benefit of the new discretion afforded the district courts, but should not be punished under the new standard regarding arguments for extension or modification of the law. The court reasoned that to charge petitioner with knowledge of a standard of

nonfrivolousness "not in effect at the time of filing * * * would not advance Rule 11's central goal of deterring baseless filings." Pet. App. a24-a25. The court of appeals' decision was thus to petitioner's benefit in all material respects.

2. a. Petitioner contends (Pet. 22-31), however, that the court of appeals should also have remanded the case for application of the new Rule's provision requiring the district courts to describe with specificity the conduct that constitutes a violation of Rule 11. See Fed. R. Civ. P. 11(c)(3) ("When imposing sanctions, the court shall describe the conduct determined to constitute a violation of this rule and explain the basis for the sanction imposed.").[4] According to petitioner, the court of appeals' instructions limiting the application of amended Rule 11 relieved the district court of the obligation to identify with specificity petitioner's conduct that violated Rule 11 and denied petitioner the opportunity "to show that none of the carefully constructed counts in the complaints was in the least bit frivolous." Pet. 9.[5]

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[4] Petitioner urges the Court to issue a writ of mandamus to the court of appeals to require the application of amended Rule 11 on remand, but there is no basis in the record for such extraordinary relief. The relief sought by petitioner can readily be granted, if appropriate, by writ of certiorari. "[T]he remedy of mandamus is a drastic one, to be invoked only in extraordinary situations. * * * Only exceptional circumstances, amounting to a judicial usurpation of power, will justify the invocation of this extraordinary remedy." *Allied Chemical Corp.* v. *Daiflon, Inc.*, 449 U.S. 33, 34-35 (1980). Petitioner acknowledges that his petition may be treated as a petition for a writ of certiorari, and he invokes the Court's jurisdiction under 28 U.S.C. 1254 in the alternative. Accordingly, this opposition treats petitioner's arguments as if they had been made in a petition for a writ of certiorari.

[5] Petitioner also argues that the equities involving his financial condition were not considered by the district court in imposing

Contrary to petitioner's suggestion, the court of appeals did not preclude the application of any new favorable specificity standard added by the amended Rule 11. A requirement of specificity was well established as part of the Rule 11 analysis prior to the 1993 amendment, as petitioner acknowledges (Pet. 22, 24). Under the old version of Rule 11, a decision to impose sanctions against an attorney required "specific findings of fact and conclusions of law." *Thomas* v. *Capital Security Servs.*, 812 F.2d 984, 990 (5th Cir. 1987); accord *White* v. *General Motors Corp.*, 908 F.2d 675, 685 (10th Cir. 1990) ("[T]he sanctioning of a party requires specific findings that the party was aware of the wrongdoing."), cert. denied, 498 U.S. 1069 (1991); *Thomas* v. *Evans*, 880 F.2d 1235, 1240 (11th Cir. 1989); *Brown* v. *Federation of State Medical Bds.*, 830 F.2d 1429, 1438 (7th Cir. 1987). District courts were required to "state with some specificity the reasons for the imposition of a sanction, and the manner in which the sanction was computed." *Teamsters Local No. 579* v. *B & M Transit, Inc.*, 882 F.2d 274, 279-280 (7th Cir. 1989).

b. In this case, the district court gave sufficiently specific reasons to justify its decision to impose sanctions on petitioner. In the *Bivens* action, the district court found that petitioner had advanced the same arguments that he had offered before to four courts of appeals without success, that his arguments therefore had no basis in existing law, and that petitioner also had presented no good-faith argument for the reversal of that

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sanctions. Pet. 10-11. Petitioner, however, had the opportunity to make such equitable arguments to the district court, but he failed to respond to the district court's invitation for submissions regarding the appropriate sanction to be imposed. See Pet. App. a37-a40, a51, a53.

existing law. Pet. App. a32-a34. In the FTCA case, the district court found that petitioner's repeated presentation of rejected legal arguments revealed that the motivation for the lawsuit was a personal agenda against the FAA, which was an improper purpose for filing the complaint. *Id.* at a47-a50. The district court also reaffirmed its prior conclusion that petitioner had no good-faith basis for advocating the reversal of existing law precluding his legal arguments about the invalidity of the FAA's actions. *Id.* at a46.

Petitioner contends that the district court should have scrutinized each count of each complaint for reasonableness before imposing sanctions. Nothing in Rule 11, however, requires that degree of specificity. Even the amended Rule requires only that the district court describe "the conduct determined to constitute a violation of [the Rule]" (Fed. R. Civ. P. 11(c)(3)); it does not require the district court to parse pleadings to determine whether any nonsanctionable arguments are contained therein. Under the Rule, an attorney may be sanctioned for advancing a frivolous claim, even if he also advances other, nonfrivolous ones. *Teamsters Local No. 579*, 882 F.2d at 280-281. Here, the district court imposed sanctions on petitioner because the majority of the claims he advanced were frivolous; even if petitioner also advanced nonfrivolous ones in other pleadings or parts of pleadings, that does not excuse his conduct in violation of Rule 11. Moreover, when the district court invited submissions on the amount of sanctions to be imposed, petitioner had an opportunity to argue that the sanction should be apportioned to reflect only the defendants' expenses in meeting the nonfrivolous claims, but petitioner did not take advantage of that opportunity. See note 5, *supra*. Consequently, there is no reason to remand this case for a recalculation of the sanctions.

CONCLUSION

The petition for a writ of mandamus should be denied. If the petition for a writ of mandamus is treated as a petition for a writ of certiorari, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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